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IN THE

Supreme Court of the United States

October Term, 1975.

No. 74-1418

MADELINE BUCHANAN, ET AL.,

Appellants,

vs.

BRENDA EVANS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

PETITION FOR REHEARING.

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

On 17 November 1975, the Court in effect disposed of the appeal in this case by the single word: "Affirmed." "One is left to ask why. The Court never said." *Bickel, The Morality of* Consent 28 (1975).

Although we recognize that all petitions for rehearing are presumptuous, we believe that we have solid grounds for our presumption here. We do not direct ourselves to any of the

read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."

3. *The Court's judgment may be interpreted as overruling* *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Inasmuch as the instant case and *Milliken* v. *Bradley*, 418 U. S. 717 (1974), are four-square on the facts, some persons have interpreted the Court's judgment of affirmance to mean that the Court has reversed its position in *Milliken*. The device of a summary affirmance has been used before to overrule prior authority. For example, *Tyson* v. *Banton*, 273 U. S. 418 (1927), was thus overruled *sub silentio* when *Gold* v. *DiCarlo*, 235 F. Supp. 817 (S. D. N. Y. 1964), was affirmed by per curiam order without briefs or argument in 380 U. S. 520 (1965). Credence is lent this interpretation by the persistent refusal of the lower courts to find *Milliken* applicable to their cases, and the reiterated refusal of this Court to review those judgments. See, *e.g.*, *Newburg Area Council* v. *Bd. of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974), *cert. den.* 43 U. S. Law Week 3571 (22 April, 1975); *United States* v. *Missouri*, 515 F. 2d 1365 (8th Cir. 1975), *cert. den.* 44 U. S. Law Week 3280 (11 Nov., 1975); *United States* v. *School District of Omaha*, 521 F. 2d 530 (8th Cir. 1975), *cert. den.* 44 U. S. Law Week 3280 (11 Nov., 1975). If this is, indeed, the meaning of the Court's action in this case, it behooves the Court to say so. For, as Mr. Justice Jackson said in *Magnolia Petroleum Co.* v. *Hunt*, 326 U. S. 430, 447 (1944): "Overruling a precedent always introduces some confusion and the necessity for it may be unfortunate. But it is as nothing to keeping on our books utterances to which we ourselves will give full faith and credit only if the outcome pleases us."

4. *The Court's judgment may be interpreted as an affirmance on the merits that the case below is distinguishable from Milliken* v. *Bradley*. The trial court sought to distinguish *Milliken*

on two grounds. First, that there was evidence here as to interdistrict housing violations that were not considered in *Milliken*. Second, that the interdistrict violation consisted of the state statute, the Education Advancement Act of 1968. It is, we submit, important to know whether this Court's action was such a substantive ruling and, if so, on which ground. For implicit in such a ruling is a rejection of earlier decisions of this Court. The housing evidence is not so strong for plaintiffs here as it was either in *Milliken* or in *Bradley* v. *School Board of the City of Richmond*, 338 F. Supp. 67 (E. D. Va. 1970), *rev'd*, 462 F. 2d 1058 (CA 4th, 1972), *aff'd by an equally divided Court*, 412 U. S. 92 (1973). If the statute constituted the interdistrict violation, the ruling is inconsistent with this Court's decisions in *Jefferson* v. *Hackney*, 406 U. S. 535, 537-38 (1972); *James* v. *Valtierra*, 402 U. S. 137 (1971); *Palmer* v. *Thompson*, 403 U. S. 217 (1971); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973). Each of these decisions is an important precedent whose vitality would be brought in question if this is the proper interpretation of the Court's judgment in this case.

5. *Further proceedings in this case are dependent on a clarification of the Court's judgment.* The position taken by the dissenters in this court, as well as some of the above-stated interpretations of this Court's judgment, leaves it unclear whether further proceeding in this case should be carried on by a three-judge court or by a single district judge. Cf. *Hagans* v. *Lavine*, 415 U. S. 528, 544 (1974). The proper resolution of this question will determine not only who the trier of fact is to be, but what course appeals from future judgments by the district court should take, *i.e.*, by appeal to the Court of Appeals for the Third Circuit or by appeal to this Court. Only such a clarification will remove this case from a morass of procedural difficulties that will shadow the final judgment herein and unduly extend the period of litigation.

We respectfully submit, therefore, that this Court should grant rehearing to clarify its judgment, if not to afford argument and briefing on the merits.

Respectfully submitted,

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Certificate of Counsel.

There is no stay or supersedeas involved. The proceedings below are going forward without interference by this appeal. As counsel for the appellants, I hereby certify that this petition for rehearing is presented in good faith and not for the purposes of delay.

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Counsel for Appellants.